

# THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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## EDITORIAL BOARD

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## Association Activities

AT THE January Stated Meeting the following resolution, presented by the Special Committee on Housing and Urban Development, Lewis M. Isaacs, Jr., Chairman, was adopted:

RESOLVED that The Association of the Bar of the City of New York recommends that the legislature at its 1961 Session amend the Emergency Housing and Rent Control Law and extend it for ten years with specific provisions for gradual decontrol and fair rent increases in accordance with the recommendations of this Committee in its report.

Copies of the Committee's report were mailed in advance of the meeting to the membership.

At the Stated Meeting an interim report was received from the Special Committee To Cooperate With The International Commission of Jurists, George N. Lindsay, Jr., Chairman.

A plaque commemorating Mr. Samuel J. Tilden, a former Vice-President of the Association, was unveiled. The remarks of the President of the Association and Mr. Tweed on this occasion follow:

### MR. MARDEN

"We have chosen this evening to pay tribute to one of the Founders of this Association, Samuel J. Tilden. Mr.

Tilden, as you will recall, was the man chiefly responsible for smashing the corrupt Ring which held control of the City of New York during and following the War between the States. He served as Governor of New York and, in the Presidential election of 1876, he polled a quarter million more votes than Mr. Hayes, who was declared elected. Many believe that Tilden was the true victor in that contest.

"Mr. Tilden was born at New Lebanon, New York in 1814. He was a sickly child and never achieved robust health. Entering Yale at the age of 20 he was forced by bad health to leave after a year. According to his letters, his weak stomach could not take the "boiled shad and potatoes" which seems to have been the main delicacy at the dinner table. Coming to New York City, he continued his education at New York University and was a member of the first class graduated from its Law School.

"In 1841, Tilden was admitted to the New York Bar; on the same day as his Yale classmate, William M. Evarts. Mr. Evarts was destined to become the first President and Mr. Tilden the first Vice-President of this Association.

"A prodigious worker, despite the ill health which haunted him throughout his life, Mr. Tilden soon achieved great success at the Bar. It is said that at one time he represented more than half of the railways north of the Ohio River and between the Hudson and Missouri Rivers.

"For the next few moments I hope that you will come back with me to the historic meeting which gave birth to this Association. That meeting took place on the 1st of February 1870—nearly 91 years ago. The notorious Ring was in full control of the government of our city. This tribe of thieves was aided and abetted by corrupt judges and dishonorable lawyers. The legal profession in general had lost the confidence and respect of the public. Yet there were among those practicing at the Bar men of ability and integrity.

"In December of 1869 a petition was circulated among the leading lawyers of the City. It called for a meeting to organize the members of the Bar "to promote the interest of the public." The petition was signed by some 200 of the 4,000 lawyers then practicing in New York and the meeting was held on February 1, 1870. Among those who spoke were men whose names are familiar even today—Edgar Van Winkle, Albert Matthews, Henry Nicoll, Edwards Pierrepont, Samuel J. Tilden and William M. Evarts. Of Tilden's part in that meeting we have the testimony of an eye witness, William Allen Butler, the author of the Tilden Memorial prepared for this Association.\* After referring to the judicial corruption and low morale at the Bar which then existed, Mr. Butler writes:

'At this critical moment the call was issued for the meeting at which this Association was formed. Those of our number who were present at that meeting at the Studio Building (Fifth Avenue and Twenty-sixth Street), on the evening of February 1, 1870, may recall the circumstances under which Mr. Tilden spoke, quite late in the evening, and when as he was about quitting the room he was called back by general acclamation, and standing near the door made the most stirring speech of the hour, unpremeditated, as he afterwards said, but striking the keynote of the effective denunciation which aroused and quickened public sentiment to the need of instant action.

'He said, "If the Bar is to become merely a mode of making money, making it in the most convenient way possible, but making it at all hazards, then the Bar is degraded. If the Bar is to be merely an institution that seeks to win causes, and win them by back door access to the judiciary, then it is not only degraded, but it is corrupt.\* \* \*

"The Bar, if it is to continue to exist, if it would restore itself to the dignity and honor which it once possessed, must be bold in defence, and, if need be, bold in aggression. If it will do its duty to itself, if it will do its duty to the profession which it follows, and to which it is devoted, the Bar can do everything else. It can have reformed constitutions, it can have a reformed judiciary, it can have

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\* The full text of Mr. Butler's memorial will be found at page 87 of this number of THE RECORD.

the administration of justice made pure and honorable, and can restore both the Judiciary and the Bar, until it shall be once more, as it formerly was, an honorable and elevated calling."

"Complete destruction of the Ring followed within two or three years of the date of our first meeting. Chief credit for this remarkable achievement must go to Mr. Tilden. Although Chairman of the Democratic State Committee, he did not hesitate to fight corrupt elements within his own party. In his Memorial, Mr. Butler quotes the testimony of Charles O'Connor, who was in a position to know the facts: 'It was all Tilden's work and no one else. Tilden went to the Legislature and forced the impeachment against every imaginable obstacle, open and covert, political and personal.'

"Mr. Butler's Memorial concludes with these words:

'It is in the retrospect of the great public peril which summoned Mr. Tilden to aid in the rescue of the State and of the peculiar service which he gave with unselfish and untiring fidelity and with full success, that we find as in a focus, the converging force and radiance of his best faculties and gifts; a cheering and guiding light, unobscured and inextinguishable.'

"One of our most distinguished Presidents was James C. Carter. He was a staunch Republican as Tilden was a staunch Democrat. In an article about Mr. Tilden which appeared in the *Atlantic Monthly* for October, 1892, Mr. Carter confesses that it was an uphill fight for him to like Mr. Tilden. They were in opposing political camps and Carter himself states that he was blinded by political considerations in their early acquaintanceship. Following the Civil War, Carter saw a good deal of Tilden and, as he writes:

'I became more and more impressed with his prodigious superiority to other men.'

"Of Tilden's leadership in the movement which removed the Ring, Mr. Carter writes:

'Although a strict party man and Chairman of the Democratic State Committee, yet, finding that the Democratic organization of

the city of New York could not be wrested from the control of the official delinquents, he organized and led the popular movement which effected their overthrow. He accepted, at the same time, a nomination for the legislature, was elected, and extorted from a reluctant majority the impeachment of the corrupt judges who had disgraced the judicial ermine.'

"Mr. Carter then concludes with his evaluation of the worth of this remarkable man:

'I cannot help thinking that Governor Tilden possessed, on the whole, greater capabilities for usefulness in public life than any other man of his generation.'

"And now we come to the high point in tonight's ceremony. Our beloved former President, Mr. Harrison Tweed, will present to the Association a commemorative plaque of Samuel J. Tilden. This beautiful plaque is the work of Eleanor Platt, the gifted sculptor whose works grace other parts of this House.

"As we pass out of the Meeting Hall this evening you will see Mr. Tilden standing on guard. If you should catch his eye—I suspect that you will ask yourselves—as I have—these questions: Is this great Association, today, measuring up to the hopes and aspirations of our Founders? Do we have the courage and the fortitude of Samuel J. Tilden in fighting for those things we know to be right?"

#### MR. TWEED

"The sequences which have led to this happy occasion began some fifteen years ago when I had the honor to be President of the Association. One of my advisers was Otto Wierum, who died in 1950. He had been Chairman of the Executive Committee in 1935. He was one of the wisest men I ever knew and one of the most loyal Democrats. There is no inconsistency in that. He used to say to me that the Association had been very remiss in not doing appropriate honor to Samuel J. Tilden. I agreed with him

but didn't know quite what to do about it. Finally, he came forward with an offer to pay the cost of inscribing on the rostrum the quotation from Tilden's speech at the Organization Meeting, which is now there.

"You will remember that it ends with the words the bar, 'if need be, [must be] bold in aggression.' There had been various versions and revisions and I had approved the final form. Imagine my horror when I first looked at the rostrum to discover that "aggression" was spelled with only one "g." Sidney Hill, who was then Librarian and General Manager, was equally horrified. And we were told that it would cost a lot of money to have the other "g" added.

"We dreaded what Otto Wierum would say. I expected a severe lecture at the least. However, Mr. Wierum looked at the inscription, smiled, and said: 'You over-estimate the intelligence of the Bar. Most of them won't notice that it is spelled wrong.' So we let it stay for quite a while, long enough I think to prove that Mr. Wierum was right. But, finally, Sidney Hill broke down and somehow found some money to have the correction made.

"After Mr. Wierum's death C. C. Burlingham, another wise man and a good Democrat, took up the cudgels on behalf of Mr. Tilden, and when Mr. Burlingham took up the cudgels things got done. We quickly agreed that, partly because we admired Tilden and partly because we had loved Wierum, a suitable memorial should be placed in the building of the Association. We agreed also that it should be a bronze plaque, executed by Miss Eleanor Platt, who had already proved her genius in our busts of Stimson, Burlingham and Davis, and previously in her head of Brandeis, of which we have a replica.

"I was very glad to participate in the enterprise, partly because of my admiration for Miss Platt's work and partly because I have always had a strong preference for portraiture in bronze rather than in pigment on canvas. It is

a form which requires the deepest study of the subject because it must stand entirely on its merits unaided by embellishments of color and background. It has this further merit, that it permits of replicas which, in the art world, become as prized and as valuable as the original. This is not true of paintings, which can be reproduced only by copying or some mechanical process, with a product of insignificant importance. As in the past, the Association will be happy if other organizations or individuals are interested in a replica of the work of art we are dedicating tonight.

"Before very long we had a committee organized, consisting of Messrs. Burlingham, Seymour, Klots, Loeb, Bonsal and me. We raised from the membership the very minimum amount necessary to compensate the artist and to pay for the casting of the bronze and installation of the plaque. Fortunately or unfortunately, in the hands of Eleanor Platt, Mr. Tilden gained in stature and acquired a magnificent overcoat and a top hat. This has increased the expense of the plaque. So I think it is permissible for me to say any member of the Association who wishes to make a new or a further contribution, presumably according to the standard originally adopted of \$25 or more, is privileged to do so. Two years or more have passed since contributions were asked and in that time the Democrats in the Association have become more numerous and, in many cases, more prosperous.

"Although the form of this memorial to Mr. Tilden is most appropriate and a magnificent work of art, the timing of this dedication is perhaps even more perfect. We have recently passed through an election even closer than that of 1876, although the decision was arrived at without the same acrimony as in that year, and a Democratic Administration is about to demonstrate how well it can run this country and perhaps to prove even to Republicans like me that the country would have been better off if Tilden

instead of Hayes had been declared elected eighty-four years ago. I hope it does."



ON JANUARY 17 the legislature completed action on the first major reorganization of the New York court system in 113 years. On that day the Assembly approved a constitutional amendment by a vote of 135 to 8. In the Senate the amendment was approved unanimously. Major provisions of the bill include:

Two new city-wide courts, one of criminal jurisdiction and one of civil jurisdiction up to \$10,000.

Abolition of the Court of General Sessions, the County Courts in New York City, the City Court, the Domestic Relations Court, the Municipal Court, Court of Special Sessions and Magistrate's Court.

Establishment of a new Family Court throughout the State and in New York City.

Provision for upstate counties to adopt a District Court system by referendum, eliminating and consolidating smaller local courts in the process.

Requirement that county judges be full time judicial officers with no outside law practice.

Requirement that the legislature provide an educational program for police justices and justices of the peace.

Establishment of a new 11th Judicial District to consist of Queens County.

Continuation of the Court of Appeals, Appellate Divisions, Supreme Court, County Courts upstate, the Court of Claims and the Surrogate's Court.



THE FOLLOWING editorial appeared in *The New York Times* for January 16, 1961:

#### A PLAN FOR MORE STATE JUDGES

"At last some real progress is in sight toward relieving the insufferable congestion in the busiest state and county courts—this time by a method which promises the selection of those best qualified to serve. Chief Judge

Desmond of the Court of Appeals, highest judicial officer in the state, has recently outlined how this might be done.

"The Judicial Conference, of which he is chairman, is considering a plan to recommend to the Legislature the creation of thirty-two new judgeships distributed among the judicial districts in proportion to the need of increased personnel. There would be twenty-seven in the Supreme Court districts and five in the County Courts, with twenty in New York City, where calendar conditions are the worst. The way in which the new places would be filled under the plan is ingenious—and promising from the public point of view.

"The State Constitution provides that vacancies occurring in the State and county courts between elections shall be filled through appointment by the Governor for terms that would terminate at the end of the year. As soon as the new places proposed in the plan were authorized by law—which would be early this year—Mr. Rockefeller could fill them temporarily. As the Constitution also provides, such temporary appointments are followed by the selection of judges for full terms at the next election in the usual way, to take office the following Jan. 1.

"We hope this plan goes through. Its success, of course, will depend on some understanding in advance as to dividing the appointments among the major parties, possibly in the light of lists presented to the Governor. But surely Mr. Rockefeller would take particular care to appoint only persons who are exceptionally well qualified and party leaders would keep that very much in mind in making their suggestions. Presumably, too, the judges so appointed would have the best chance of nomination and election—possibly without contests—next November. That would be all to the good."



AT ITS November meeting the Committee on Municipal Affairs, Paul Windels, Chairman, had as its guests former Lieutenant Governor Moore, Phillip W. Haberman, Jr., Arthur H. Goldberg and Seymour Graubard, all members of the Commission on Charter Revision. The representatives of the Commission discussed the studies being made by the Commission and at the end of their discussion Mr. Windels appointed Subcommittees to report back on problems dealing with the Mayor's Office, the Office of the Comptroller, the Board of Estimate, the Office of Borough President and the City Council.



JUSTICE PHILLIP B. THURSTON of the Domestic Relations Court discussed the legislative program of the Board of Justices of that

court with the Association's Committee on the Domestic Relations Court, Edgar J. Nathan, 3rd, Chairman.



THE COMMITTEE on Law Reform, William L. Lynch, Chairman, is continuing its study of the Uniform Rules of Evidence. The study is in charge of a Subcommittee under the Chairmanship of Judge Joseph A. Sarafite. A Subcommittee under the Chairmanship of Amos J. Peaslee, Jr. is completing a study of partition actions. The Committee is also considering the suggestion of Judge Archie O. Dawson that legislation be enacted to extend the principles of workmen's compensation to seamen and railroad employees. Among other projects before the Committee are the practicability of legislation relating to the problem of proof by secondary evidence of the contents of official records destroyed by bomb attack or other catastrophe; the proposals of the English Royal Commission on divorce; and reform in the laws relating to narcotics addiction.



AT A RECENT meeting of the Committee on Insurance Law, Harry J. McCallion, Chairman, the Committee had as its guests Senator Samuel L. Greenberg, member of the Joint Legislative Committee on Insurance Rates and Regulations; Senators Joseph Marro and Frank J. Pino, members of the Senate Insurance Committee; Assemblyman Max M. Turshen, member of the Assembly Insurance Committee; Peter Ward and Newell Alford, Deputy Superintendents of Insurance; Sedgwick W. Green, counsel to Senator MacNeil Mitchell and Sheldon Oliensis, Chairman of the Association's Committee on State Legislation. The Committee discussed with its guests general matters relating to proposed legislation in the field of insurance.



AT THE annual Twelfth Night Party sponsored by the Committee on Entertainment, of which Mitchell Jelline is the Chairman, the President of the American Bar Association, Whitney North Seymour, was both entertained and entertained an overflow audi-

ence. The Subcommittee in charge of the party, of which Alan J. Littau was the Chairman, had promised that "talented members of the Bench and Bar would provide entertainment, very likely including the portrayal of certain incidents in the career of the guest of honor which had not hitherto been exposed to public view." Mr. Littau's Subcommittee kept its promise.



"CONFLICT OF INTEREST" was the subject of a discussion sponsored by the Association's Section on Corporate Law Departments, Otto Kinzel, Chairman, in collaboration with the American Bar Association's Committee on Corporate Law Departments, John S. Tennant, Chairman. Speakers were Lowell C. Wadmond, George Watt and David T. Searls.

Two symposia were sponsored by the Committee on Medical Jurisprudence. "Psychiatric Aspects of Personal Injury Actions" was discussed by Dr. Lawrence I. Kaplan, Director, Neurological Service, Hospital For Joint Diseases. Also participating in the program were Isadore Halpern and Emile Zola Berman. The moderator was A. Harold Frost, Chairman of the Section on Litigation. Morris Ploscowe, Chairman of the Committee on Medical Jurisprudence, acted as moderator of a discussion on "The Preparation and Trial of a Malpractice Action." Speakers were Charles Kramer and Harold Shapero.

William Edwards Murray discussed "Tax Powers in Wills" before the Section on Wills, Trusts and Estates, Edward Ridley Finch, Jr., Chairman.



THE COMMITTEE on Labor and Social Security Legislation, Morris P. Glushien, Chairman, will undertake a study on a broad basis of the Conlon-Wadlin Act and the right of public employees to engage in concerted activity.



THE PUBLICATION of "Basic Corporate Practice" by George C. Seward, a member of the Association, has been announced by the Joint Committee on Continuing Legal Education. The vol-

ume is a substantially revised version of the first edition published in 1957. Mr. Seward is a former Chairman of the Section on Corporation, Banking and Business Law of the American Bar Association and of that Section's Committee on Corporate Laws. The price of the volume is \$3 and it may be secured from the Joint Committee at 133 South 36th Street, Philadelphia 4.



*The New York University Law Review* has announced the publication of its annual survey of New York law. The volume covers public law, commercial law, property law, torts and family law and adjective law.



THE UNIVERSITY of Michigan Law School will offer a second special summer school for lawyers to be held June 19-30 at Ann Arbor. Courses to be offered are: Estate planning, wills and trusts, trade regulation, business tax planning and admiralty.



JUDGE SIDNEY SUGARMAN of the United States District Court for the Southern District of New York has asked THE RECORD to advise members of the Association that graduates of the Boston University School of Law are forming an alumni group in New York. Alumni of the school are requested to write Judge Sugarman.



THE PUBLISHERS of the following Law Lists and Legal Directories have received Certificates of Compliance from the Standing Committee on Law Lists of the American Bar Association for their 1961 editions:

*Commercial Law Lists*

A. C. A. LIST

Associated Commercial Attorneys  
List  
165 Broadway  
New York 6, New York

AMERICAN LAWYERS QUARTERLY

The American Lawyers Company  
Suite 1417 East Ohio Building  
Cleveland 14, Ohio

**THE B. A. LAW LIST**

The B. A. Law List Company  
415 Colby-Abbot Building  
Milwaukee 2, Wisconsin

**THE CLEARING HOUSE QUARTERLY**

Attorneys' National Clearing  
House Co.  
3539 Hennepin Avenue  
Minneapolis 8, Minnesota

**THE COLUMBIA LIST**

Columbia Directory Company, Inc.  
320 Broadway  
New York 7, New York

**THE COMMERCIAL BAR**

The Commercial Bar, Inc.  
521 Fifth Avenue  
New York 17, New York

**THE C-R-C ATTORNEY DIRECTORY**

The C-R-C Law List Company,  
Inc.  
15 Park Row  
New York 38, New York

**FORWARDERS LIST OF ATTORNEYS**

Forwarders List Company, Inc.  
38 South Dearborn Street  
Chicago 3, Illinois

**THE GENERAL BAR**

The General Bar, Inc.  
The Bar Building  
36 West 44th Street  
New York 36, New York

**THE INTERNATIONAL LAWYERS**

International Lawyers Company,  
Inc.  
33 West 42nd Street  
New York 36, New York

**THE NATIONAL LIST**

The National List, Inc.  
122 East 42nd Street  
New York 17, New York

**RAND McNALLY LIST OF BANK**

RECOMMENDED ATTORNEYS  
Rand McNally & Company  
P. O. Box 7600  
Chicago 80, Illinois

**WRIGHT-HOLMES LAW LIST**

Wright-Holmes Corporation  
225 West 34 Street  
New York 1, New York

*General Law Lists***AMERICAN BANK ATTORNEYS**

Capron Publishing Corporation  
8 Grove Street  
Wellesley 81, Massachusetts

**THE AMERICAN BAR**

The James C. Fifield Company  
121 West Franklin  
Minneapolis 4, Minnesota

**THE ATTORNEYS' REGISTER**

The Attorneys' Register Publishing  
Co., Inc.  
Munsey Building  
Baltimore 2, Maryland

**THE BAR REGISTER**

The Bar Register Company, Inc.  
One Prospect Street  
Summit, New Jersey

**CAMPBELL'S LIST**

Campbell's List, Inc.  
Campbell Building  
905 Orange Avenue  
Winter Park, Florida

**INTERNATIONAL TRIAL LAWYERS**

Directory Publishers, Inc.  
84 South Cherry Street  
Galesburg, Illinois

## THE LAWYERS DIRECTORY

The Lawyers Directory Publishers  
607 East Market Street  
Charlottesville, Virginia

## THE LAWYERS' LIST

The Law List Publishing  
Company, Inc.  
521 Fifth Avenue  
New York 17, New York

## MARKHAM'S NEGLIGENCE COUNSEL

Markham Publishing Corporation  
Markham Building  
66 Summer Street  
Stamford, Connecticut

## RUSSELL LAW LIST

Russell Law List  
35 Grove Street  
New Canaan, Connecticut

*General Legal Directory*MARTINDALE-HUBBELL LAW  
DIRECTORY

Martindale-Hubbell, Inc.  
One Prospect Street  
Summit, New Jersey

*Insurance Law Lists*BEST'S RECOMMENDED INSURANCE  
ATTORNEYS

Alfred M. Best Company, Inc.  
75 Fulton Street  
New York 38, New York

## HINE'S INSURANCE COUNSEL

Hine's Legal Directory, Inc.  
P. O. Box 71, 443 Duane Street  
Glen Ellyn, Illinois

## THE INSURANCE BAR

The Bar List Publishing Company  
State Bank Building  
Evanston, Illinois

UNDERWRITERS LIST OF TRIAL  
COUNSEL

Underwriters List Publishing  
Company  
308 East Eighth Street  
Cincinnati 2, Ohio

*Probate Law Lists*

## THE PROBATE COUNSEL

Probate Counsel, Inc.  
First National Bank Building  
Phoenix, Arizona

## SULLIVAN'S PROBATE DIRECTORY

Sullivan's Probate Directory, Inc.  
84 South Cherry Street  
Galesburg, Illinois

*State Legal Directories*

## Publisher—The Legal Directories Publishing Co., Inc.

1072 Gayley Avenue  
Los Angeles 24, California

Alabama, Florida and Georgia Legal  
Directory

Arkansas, Louisiana and Mississippi  
Legal Directory

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|---|---|
| Carolinas, Virginias and District of<br>Columbia Legal Directory  | New England Legal Directory<br>(For the States of Connecticut,<br>Maine, Massachusetts, New Hamp-<br>shire, Rhode Island and Vermont) |
| Illinois Legal Directory  | New York, Delaware, Maryland and<br>New Jersey Legal Directory  |
| Indiana Legal Directory   | Ohio Legal Directory  |
| Iowa Legal Directory  | Oklahoma Legal Directory  |
| Kansas Legal Directory  | Pacific Coast Legal Directory<br>(For the States of Alaska, Arizona,<br>California, Hawaii, Nevada, Ore-<br>gon and Washington)       |
| Kentucky and Tennessee Legal<br>Directory   | Pennsylvania Legal Directory  |
| Michigan Legal Directory  | Texas Legal Directory   |
| Minnesota, Nebraska, North Dakota<br>and South Dakota Legal Directory   | Wisconsin Legal Directory   |
| Missouri Legal Directory  |   |
| Mountain States Legal Directory<br>(For the States of Colorado, Idaho,<br>Montana, New Mexico, Utah and<br>Wyoming) |   |

*Foreign Law Lists*

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|---|---|
| BUTTERWORTHS EMPIRE LAW LIST<br>Butterworth & Company<br>(Publishers) Ltd.<br>88 Kingsway<br>London, W. C. 2, England                     | THE INTERNATIONAL LAW LIST<br>L. Corper-Mordaunt & Company<br>Pitman House, Parker Street<br>London, W. C. 2, England                     |
| CANADIAN LAW LIST<br>Canada Law Book Company<br>76 Pearl Street<br>Toronto 1, Ontario, Canada   | KIME'S INTERNATIONAL LAW<br>DIRECTORY<br>Kime's International Law<br>Directory, Ltd.<br>107, St. Alban's Road<br>Watford, Herts., England |
| CARSWELL'S DIRECTORY OF CANADIAN<br>LAWYERS<br>The Carswell Company Limited<br>145-149 Adelaide Street West<br>Toronto 1, Ontario, Canada |   |

## The Calendar of the Association for February and March

(as of January 26, 1961)

- February 1 Meeting of Section on Wills, Trusts and Estates
- February 2 Dinner Meeting of Committee on Real Property Law  
Meeting of Committee on Surrogates' Courts
- February 6 Dinner Meeting of Committee on Professional Ethics  
Symposium: Sponsorship Committee on Corporate  
Law Departments. 8:00 P.M. *Buffet Supper*, 6:15  
P.M.
- February 7 Dinner Meeting of Executive Committee  
Dinner Meeting of Committee on State Legislation  
Dinner Meeting of Committee on Labor and Social  
Security Legislation  
Dinner Meeting of Committee on Trade Regulation  
Meeting of Section on Trade Regulation
- February 8 *Lecture: The Law—Words or Music?*, Geoffrey Law-  
rence, Q.C., 8:00 P.M. Sponsorship Committee on  
Post-Admission Legal Education. *Buffet Supper*,  
6:15 P.M.
- February 9 Dinner Meeting of Committee on International Law
- February 10 Dinner Meeting of Committee on Trade Marks and  
Unfair Competition
- February 14 Dinner Meeting of Committee on Courts of Superior  
Jurisdiction  
Dinner Meeting of Committee on State Legislation  
Dinner Meeting of Committee on Insurance Law  
Dinner Meeting of Special Committee on Banking
- February 15 Meeting of Committee on Admissions  
Meeting of Committee on Foreign Law  
Meeting of Committee on Municipal Affairs  
Dinner Meeting of Committee on Federal Legislation  
Dinner Meeting of Committee on Legal Aid

- February 20 Dinner Meeting of Committee on Medical Jurisprudence  
Dinner Meeting of Committee on the Bill of Rights  
Dinner Meeting of Committee on Copyright  
Dinner Meeting of Committee on Housing and Urban Development
- February 21 Meeting of Committee on Arbitration  
Dinner Meeting of Committee on Aeronautics  
Dinner Meeting of Committee on State Legislation  
Dinner Meeting of Committee on Trade Marks and Unfair Competition
- February 23 Dinner Meeting of Committee on Municipal Affairs  
Dinner Meeting of Committee on the City Court of the City of New York  
Dinner Meeting of Committee on Administrative Law
- February 27 Meeting of Library Committee  
Dinner Meeting of Committee on Family Law
- February 28 Dinner Meeting of Committee on State Legislation  
Meeting of Committee on Domestic Relations Court
- March 1 Meeting of Section on Wills, Trusts and Estates
- March 6 Dinner Meeting of Committee on Professional Ethics
- March 7 Dinner Meeting of Committee on State Legislation  
Dinner Meeting of Committee on Insurance Law  
Dinner Meeting of Special Committee on Banking
- March 8 Dinner Meeting of Executive Committee
- March 13 Dinner Meeting of Committee on Housing and Urban Development  
Dinner Meeting of Committee on Corporate Law Departments
- March 14 *Stated Meeting of the Association, 8:00 P.M., Buffet Supper, 6:15 P.M.*  
Meeting of Committee on State Legislation
- March 15 Meeting of Committee on Admissions  
Dinner Meeting of Committee on Federal Legislation  
Dinner Meeting of Committee on Courts of Superior Jurisdiction  
Dinner Meeting of Committee on Foreign Law

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| March | 20 | Dinner Meeting of Committee on Copyright   |
| March | 21 | Dinner Meeting of Committee on State Legislation<br>Dinner Meeting of Committee on Aeronautics<br>Dinner Meeting of Committee on Administrative Law<br>Dinner Meeting of Committee on Trade Marks and<br>Unfair Competition<br>Meeting of Committee on Arbitration |
| March | 22 | Dinner Meeting of Committee on Municipal Affairs<br>Dinner Meeting of Committee on the Bill of Rights  |
| March | 23 | Dinner Meeting of Committee on Legal Aid<br>Dinner Meeting of Committee on Trade Regulation<br>Meeting of Section on Trade Regulation  |
| March | 27 | Meeting of Library Committee<br>Dinner Meeting of Committee on Medical Jurisprudence<br>Meeting of Committee on Family Law   |
| March | 28 | Dinner Meeting of Committee on State Legislation<br>Dinner Meeting of Committee on Domestic Relations<br>Court<br>Dinner Meeting of Committee on Insurance Law   |

## Samuel J. Tilden

1814 - 1886

*At the Stated Meeting of the Association held on January 17, 1961, there was unveiled a memorial plaque to Mr. Tilden. The plaque is the work of the American sculptor, Miss Eleanor Platt. The presentation was made by Mr. Harrison Tweed. Reprinted here is the memorial to Mr. Tilden prepared by Mr. William Allen Butler and read before the Association on December 14, 1886.*

In presenting, at the request of the Executive Committee, a memorial of the life and character of our deceased fellow member, SAMUEL J. TILDEN, I recognize the propriety and necessity of the rule of our body which limits these commemorative sketches to a few pages of the Memorial Book. This requirement must be observed in the present instance, notwithstanding the wide field which might otherwise be occupied in the survey of a character and career of unusual importance in their relations to State and National affairs, aside from the special interest which attaches to them for us in view of the professional life of Mr. Tilden, the part taken by him in forming this Association, and the remarkable way in which, in a great public emergency, he aided in giving practical effect to the main purposes of its organization.

In the briefest retrospect of the life of Mr. Tilden we are arrested by certain sharp and striking contrasts which in his case, as in that of many men of mark, seem to come into prominence only when the whole life is looked at across the interval by which Death separates it from the current interests and intercourse of men.

With him the sovereign element of self-reliance, the main-spring of the largest success, was hampered by physical ailments which deprived him of the benefit of a completed academic course of study, and which often interfered with his capacity for active service, yet his years of life, from his birth on February 4, 1814,

to his death on August 14, 1886, outran the prescribed limit, were crowded with the most varied labors, and were never clouded by any abatement of intellectual vigor. Beginning life with scanty means, and for many years contenting himself with the simplest arrangements for his personal comfort and convenience, he came to possess, as the result of his sagacity and financial skill, the amplest means for the gratification of the cultivated tastes and the love of Nature exhibited so liberally both in his city and his country homes. As a lawyer, never identified with the general practice of the profession, or seeking a large clientage, he became a master of the law as a science and an acknowledged authority in one of its branches most closely allied with the main sources of our national prosperity. Without special forensic ability, he gained, in conspicuous cases, signal victories at the Bar. Without any gift of oratory or of what, for want of better words, we call personal magnetism, he came to be the acknowledged head of a great party; the Chief Executive of his native State; the recipient of a majority of the popular vote for the Presidency, and, according to the final arbitrament of the Electoral Commission, of 184 against 185 votes in the Electoral Colleges; and in his voluntary retirement he retained to the end of his life a potent influence in public affairs.

The lights and shadows which belong to this many-sided life must not tempt us from the view, to which we are confined, of that part of Mr. Tilden's career, which belongs more closely to our own professional sphere. And yet his activities as a lawyer and as a public man, were in an unusual degree coincident, and it was his legal training which qualified him for the best discharge of civic trusts. He was always an intensely interested actor in public affairs; always a power in the political party into which he was born and in which he was nurtured. He had a natural bent and zest for politics as one of the great factors in human affairs and human progress. His native fondness for study, quickened by intercourse with superior minds, and turned, by the circumstances which interrupted his college course, into the channel of secluded thought and individual research, seized upon history,

the course of political opinion, the problems of government, and the great economic questions which they involve, and he was always a serious, careful and laborious student in these fields. To him "the years which bring the philosophic mind" came very early. In my acquaintance with him, dating from my boyhood and continuing through the friendship of nearly half a century, I found him unchanged, from first to last, in this absorbing interest in public affairs, specially directed to their right administration, according to the ideas which were, to him, the true embodiment of the principles of good government. He brought the same rare capacity and gift of patient search and exploration to bear on every subject which engaged his attention. If in his reading, which he pursued with avidity, he took up as a special topic of study some period of history, such as the English Revolution, he would embrace in his investigation whatever was necessary to the complete mastery of the subject, however wide the range of research it involved, pursuing the favorite topic without regard to time, or rest, or thought of other things.

The same habit he brought into his private affairs, his professional work and his political activities. Alike to all objects which engrossed him he gave the whole of his intellectual capacity, all the energy of his will and the full measure of his physical strength. He had a persistence which was more than perseverance and a faculty of adhesion to the main purpose in view, and of reaching it by discussion, by investigation, and by all means of possible solution, which exhausted the powers and the patience of everyone but himself. Under none of the limitations which the domestic relations impose, with more or less stringency upon even the busiest men, this concentrated absorption became his fixed habit, and was largely at once the method and the means of his success. In the case of Giles against Flagg, in which the question was which of the parties to the action had been elected Comptroller of this City, Mr. Tilden, as counsel for Mr. Flagg, went behind the returns, and by a most minute, painstaking and exhaustive process possessed himself of all the facts relating to the constituency, the poll lists and the actual vote, and the statement to the

jury of the results of this investigation, in his opening on behalf of his client, was in itself an absolute and conclusive demonstration, and practically an end of the case.

This is only a single illustration of his general and habitual methods. He believed in the potency of definite facts as the best means of producing conviction in the minds of men, and would say that to this end he would rather have one fact than a column of rhetoric. But it was the facts underlying and out of sight, and undiscoverable, except by long and patient labor, which seemed specially to attract him and to furnish a kind of native stimulus to his keen perceptions which he trained for service in the dark. This gave him a rare and in some respects unequalled power. To most men there are insuperable barriers of time and circumstance and necessity which forbid their entering the labyrinthine paths which he pursued in professional investigation or in political forecast and combination, even if they have the genius to guide them in the unaccustomed way. Along with this resource of indefatigable research came a caution which was not timidity, but the master faculty which applies Lord Bacon's rule, and sees all dangers in council and none in action. He was, as he declared in one of his speeches during the great municipal crisis of 1871 "willing to follow where anyone would lead or to lead where anyone would follow," but if he was to have the responsibility of leadership he would undertake no advance until he knew the ground to be occupied and could measure in the balance of his own judgment the forces of encounter and resistance.

With all these deliberative characteristics, and in spite of the lack of that physical robustness which by its instinctive force aids in bringing men to leadership, Mr. Tilden was bold as well as cautious, when he knew his ground. I recall an exploit of his at the Presidential election of 1844, which had in it a certain dash and vigor which commanded admiration. At that time, the election in Pennsylvania ended before that in New York began. It was one of the political sayings of the time, "as goes Pennsylvania, so goes the Union." Mr. Tilden formed and executed a plan for getting in Philadelphia at the last moment before the election

in New York, the complete returns, so far as to be decisive of the result in Pennsylvania, and of bringing them to New York in time for publication on the eve of the election in this State. At that time, before the era of the telegraph or the lightning express, this was no easy task. Mr. Tilden, however, organized his plan, went to Philadelphia, secured the returns which were unmistakably favorable to his side, and brought them in the night, by a locomotive driven at the highest rate of speed, reaching New York in good time for publishing the desired intelligence, with the inspiring effect which such a prognostic of success could not fail to impart to the adherents of the cause for which he had done this special and hazardous service.

It has been noted as a peculiarity of Mr. Tilden's career, that he did not come to public office until late in life. With the exception of the post of Corporation Attorney of the City of New York, and his service in the Assembly of 1845-6, and in the Constitutional Convention of 1846, he held no office until 1871, and followed his profession, according to an elective method as to the cases he undertook, which would have been fatal to men of less ability. His clients must bide his time for examination and action, and he must have his own way of dealing with the cause. This made him less conversant with the Courts than with the consultation room, and yet, on occasion, as in the famous Burdell case, he was found fully equipped for the active conflicts of the bar. It was only under the pressure of the great exigency which made plain the necessity of extraordinary remedies for unparalleled public evils that he came to the front in official service. His forty years of preparation gave him here unsurpassed advantages. He entered upon his strictly public life through the door of the profession. The beginning of this Association may almost be said to have been the inauguration of his public career. The conspiracy by which the most important public trusts in municipal and judicial administration in this city were turned into instruments of corrupt private greed was thoroughly organized and the conspirators were entrenched in the places of power. Mr. Tilden had refused retainers from men whose alliance with corrupt schemes

and corrupt judges was notorious. They had said to him, "We don't want anybody else; we want you." Against personal and partisan associates, he stood for honesty in administration and integrity on the Bench. At this critical moment the call was issued for the meeting at which this Association was formed. Those of our number who were present at that meeting at the Studio Building (Fifth Avenue and Twenty-sixth Street), on the evening of February 1, 1870, may recall the circumstances under which Mr. Tilden spoke, quite late in the evening, and when as he was about quitting the room he was called back by general acclamation, and standing near the door made the most stirring speech of the hour, unpremeditated, as he afterwards said, but striking the keynote of the effective denunciation which aroused and quickened public sentiment to the need of instant action.

He said, "If the Bar is to become merely a mode of making money, making it in the most convenient way possible but making it at all hazards, then the Bar is degraded. If the Bar is to be merely an institution that seeks to win causes, and win them by back door access to the judiciary, then it is not only degraded, but it is corrupt. \* \* \*

"The Bar, if it is to continue to exist, if it would restore itself to the dignity and honor which it once possessed, must be bold in aggression. If it will do its duty to itself, if it will do its duty to the profession which it follows, and to which it is devoted, the Bar can do everything else. It can have reformed constitutions, it can have a reformed judiciary, it can have the administration of justice made pure and honorable, and can restore both the Judiciary and the Bar, until it shall be once more, as it formerly was, an honorable and elevated calling."

Following upon this was the long contest with the Ring and its final overthrow, and the impeachment proceedings which arrested and put to an end the judicial malfeasance which had dishonored the Bench. The share of Mr. Tilden in this struggle is matter of history written in the records of our Association, of which he was one, and the first on the list, of its Vice-Presidents, elected February 15, 1870. His affidavit of October 24, 1871, dis-

closing the results of his personal investigation of the dealings through the Broadway Bank of the members of the Board of Audit, brought their shameless transactions into as clear a light for judicial condemnation and sentence as his analysis of the Giles and Flagg vote had made that case easy of decision. At a personal sacrifice, which he alone of the leading members of our body who united in this crusade against crime in high places was able to make, he went to the Assembly to carry against organized opposition, and the desperate struggle of detected conspirators, the necessary measures of impeachment. Respecting this, we have the testimony of Mr. O'Connor, that it "was all Tilden's work and no one's else. Tilden," he said, as reported by Mr. Bigelow, to whom the remark was made (with the addition that upon this point he was a competent witness), "went to the Legislature and forced the impeachment against every imaginable obstacle, open and covert, political and personal."

On taking the chair at a meeting of our Association on May 28, 1872, at a time when apprehension as to the result was very generally felt, he declared that he did not share in those fears and he gave a summary of the work already accomplished, and of the cause of congratulation which existed that while everything else in the way of reform had failed, this indispensable measure of impeachment had been adopted against "obstructions under every pretext" which had to "be met at every step and overcome."

The result justified his assurances. The purification of the Judiciary was accomplished by the efforts of the Bar. Within these walls there can never be a question as to the singleness of purpose, the disinterestedness and the true professional zeal which marked the service of every one of our number who in private council or in public prosecution aided in the work.

It is quite true that without an aroused public sentiment, without untiring and fearless activity on the part of the Press, without the constant co-operation and aid of public spirited citizens, the desired end could not have been secured; but, as lawyers, we know that only the due processes of the law, put in motion and kept in motion by the most sagacious, vigilant and experienced

ministers of the law, could bring to full exposure and to final judgment the wrongs and the wrong-doers. It is of little avail to attempt to measure the relative value of any one of the forces which conspired to accomplish the common purpose, or to adjust with exactness the precise rewards of merit where so many gave their best endeavors, but in the retrospect, and in a just view, it is hard to overestimate the service which Mr. Tilden rendered in this crisis of our municipal and civic life, either as to its quality and degree of professional skill or its purity of purpose.

I have given emphasis to this point of his career because it was its turning point, making him, by means of the prominence it gave him and the power he came to wield within his own political party and against powerful and organized opposition within its ranks, the most conspicuous and effective of its leaders.

It gave him the fullest opportunity of putting into practice and of insisting in public speech and in executive action upon those ideas as to the administration of affairs which were, in his view, the supreme concern of citizenship. He was thoroughly imbued with the great principles of popular government and with a keen sense of the evils which beset their practical exercise.

Certainly no public man of our day was ever more thoroughly furnished by natural or acquired aptitude to deal with those weighty problems and like the burdens of the old prophets they were his constant theme, whether men would hear or whether they would forbear.

The same energy was conspicuous in his service as Governor. He initiated at once a war against the powerful combination which had made that branch of the public service which dealt with the Canal system of the State a central source of corruption. A secret scrutiny into the methods of the contractors, undertaken and carried on by his direction, at his personal expense, disclosed the facts which his Canal message of 1875 spread before the Legislature and the People. The complete ascendancy over the hostile forces which were arrayed against him as the result of this aggressive movement in the interest of reform and economy was gained by the same patient and indefatigable course of dealing

which had already served him so well. Going behind the opposing Legislators and their immediate backers among the local constituencies they represented, he made his direct appeal to the individual voter and so effectually maintained his supremacy that his nomination for the Presidency was the necessary outcome of his established pre-eminence.

Other incidents and details are foreign to my purpose and forbidden by the prescribed limits of this brief sketch. The fierce, unsparing warfare of a Presidential campaign, with its poisoned arrows, its mercenaries and its secret service of character assassination we may leave out of view as we look back over the professional life and the service in places honorably filled. The scars of a veteran soldier adorn, or disfigure, according to the medium of sympathy or aversion through which they are observed. The leadership of a party is not a place in which to win the common suffrage of consenting approbation as to personal traits any more than the common suffrage as to public trusts. Success in attaining the highest place in the gift of the people might have given a wider field for the display of statesmanship, tempered the criticism of rivals or opponents and heightened the admiration of friends, but failure, under circumstances which were in themselves an unexampled test and trial of character, was borne with an equanimity worthy of praise.

*"Alteram sortem bene preparatum*

*"Pectus ———."*

The mind prepared for either fortune, received the commendation of the Roman poet in his ode to an ill-fated friend who fell a victim to a political accusation. In the case of Mr. Tilden this temper was exhibited, without ostentation and without bitterness, and may well serve as a shield, were any needed, against detraction or disparagement.

But whatever differences of political sentiment or affiliation may enter into our estimate of his character and work, it is a duty as well as a privilege within our own circle to assert his claim to the respect and gratitude of his brethren of the Bar and of the

community at large, in those matters as to which we speak what we know and testify what we have seen. In the rush of events and especially in the ever recurring struggles with present wrongdoing, public and private, we are too apt to be forgetful of past dangers and past deliverances and of the work of those by whom the deliverances were wrought. It is in the retrospect of the great public peril which summoned Mr. Tilden to aid in the rescue of the State and of the peculiar service which he gave with unselfish and untiring fidelity and with full success, that we find as in a focus, the converging force and radiance of his best faculties and gifts; a cheering and guiding light, unobscured and inextinguishable.

## Committee Reports

### COMMITTEE ON FEDERAL LEGISLATION

#### Report on Proposed Federal Legislation to Legalize Wiretapping Permitted by State Laws

Under date of June 24, 1960, the Committee on the Judiciary of the United States Senate reported out S. 3340, which bill had been introduced under date of April 6, 1960 by Senator Keating. Accompanying the bill, the Committee issued a brief supporting report by Senator Keating.<sup>1</sup> It does not appear that hearings were held with respect to S. 3340, although a subcommittee had held hearings during 1959 with respect to certain other bills which sought to legalize wiretapping by federal officials in specified circumstances, and which also included provisions similar to S. 3340.<sup>2</sup>

S. 3340 proposes to amend Chapter 223 of Title 18 of the United States Code by adding the following provision:

*"§3501. Evidence of Intercepted Communication.*

No law of the United States shall be construed to prohibit the interception, by any law enforcement officer or agency of any State (or any political subdivision thereof) in compliance with the provisions of any statute of such State, of any wire or radio communication, and the divul-

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<sup>1</sup> 86th Cong., 2d Sess., Senate Report No. 1720, to accompany S. 3340.

A bill similar to S. 3340 had previously been introduced in the House of Representatives by Congressman Celler as H.R. 11,589.

<sup>2</sup> Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate, 86th Cong., 1st Sess. (These hearings will hereinafter be cited as "Hearings, C.R. Subcom. Sen. Judiciary). The last reported hearings in this series, published in Part 5 thereof, were held December 15 and 16, 1959.

The principal pending bills with respect to wiretapping during this period were S. 1292 (introduced by Senator Keating) and H.R. 70 (introduced by Congressman Celler). Our Committee accorded preliminary study to S. 1292 and H.R. 70, but this report does not attempt to cover them in view of our understanding that only S. 3340, or a similar bill, is likely to be the subject of Congressional consideration early in the current session.

gence, in any proceeding in any court of such State, of the existence, contents, substance, purport, effect, or meaning of any communication so intercepted, if such interception was made after determination by a court of such State that reasonable grounds existed for belief that such interception might disclose evidence of the commission of a crime."

STATED JUSTIFICATION FOR S. 3340

The brief Report accompanying the bill indicates: (1) that the primary purpose of the bill is to overcome the effects of the recent decision of the Court of Appeals in *Pugach v. Dollinger* and *O'Rourke v. Levine*, 277 F. 2d 739 (2d Cir., April 14, 1960), and the earlier decision of the Supreme Court in *Benanti v. U.S.*, 355 U.S. 96 (1957); and (2) that the provisions of New York law<sup>3</sup> authorizing wiretapping to procure evidence of any crime, were assumed to represent an appropriate and desirable standard for the relaxation of present federal restrictions on wiretapping by state officials.

In *Benanti v. U.S.*, cited above, the Supreme Court reversed a conviction in a federal court based in part on evidence obtained as a result of wiretapping by New York State law-enforcement officers pursuant to a state-court warrant authorized by New York law, which evidence was subsequently turned over to the federal authorities by the New York State officers. Interpreting the prohibitions on wiretapping contained in the Federal Communications Act ("F.C.A."), the Court stated:

"The Federal Communications Act is a comprehensive scheme for the regulation of interstate communication. In order to safeguard those interests protected under Section 605, that portion of the statute pertinent to this case applies both to intrastate and to interstate communications. \* \* \* In light of the above considerations, and keeping in mind this comprehensive scheme of interstate regulation and the public policy underlying Section 605

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<sup>3</sup> N.Y. Const., Art. I, §12; N.Y. Code of Criminal Procedure §813-a.

as part of that scheme, we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy \* \* \* " (*Benanti v. U.S.*, 335 U.S. 96, 105)

In *Pugach v. Dollinger* and *O'Rourke v. Levine*, cited above, the Court of Appeals for the 2d Circuit re-asserted the *Benanti* principle that the F.C.A. prohibits state wire-tapping. The actual holding affirmed the district court's refusal to enjoin the introduction in evidence during trials pending in New York state courts of wiretap evidence obtained pursuant to the New York statute, the introduction of which the defendants contended would constitute a "divulgence" in violation of §605 F.C.A. The denial of the injunction was predicated on grounds of comity and other equitable considerations; however, the Court pointed to the criminal and civil penalties applicable to violations of §605 F.C.A. One of the judges further underlined the point by expressly calling upon the local U.S. attorney "to follow the proceedings [in the state court trial] with the closest attention," presumably for the purpose of initiating a prosecution against the state prosecutor if he "divulged" the wiretap evidence in the course of the state court trial.<sup>4</sup>

On June 27, 1960, the Supreme Court granted *certiorari* in *Pugach v. Dollinger*, and it appears the case will be reached for argument during January, 1961.

#### POLICY CONSIDERATIONS

There is undoubtedly need for an end to the chaotic situation resulting from the clash between the federal prohibition of all interception and divulgence of telephone communications, and the conflicting state statutes and practices. Due to the legal posture of the case, the Supreme Court's decision in *Pugach v. Dollinger* is not likely to provide the remedy.<sup>5</sup> Accordingly, con-

<sup>4</sup> 277 F.2d at 746.

<sup>5</sup> If the Supreme Court affirms the decision of the Court of Appeals, the present situation will remain unchanged; a reversal would seem to require a holding that the district court should have issued the requested injunction. The effect of such a ruling would seem to definitively nullify all wiretapping under state statutes.

sideration of possible statutory revisions is appropriate and timely.

Implicit in S. 3340 and the accompanying report is the premise that S. 3340 deals essentially with problems of local law-enforcement which are primarily the concern of the several states, and the principles and standards formulated by the respective states should accordingly be given predominant if not conclusive weight. This premise is not wholly valid. In the area covered by S. 3340, considerations of local law-enforcement are interwoven with those relating to the regulation of a nationwide system of telephonic communication, which is indisputably a matter of primary national interest and responsibility. Whether and in what circumstances state agents should be permitted to tamper with telephonic communications, a substantial and indistinguishable portion of which are interstate,<sup>6</sup> are problems of paramount federal concern, not essentially different from those which would arise if the proposals sought to empower state agents to open the mails incident to their local law-enforcement activities. We do not think it would seriously be contended that Congress should grant authority to state agents to open mail in transit in aid of local law-enforcement, without at the very least laying down precise limitations and standards as conditions precedent to the exercise of any such authority.

At the present time, it has been settled by authoritative rulings of the Supreme Court that §605 of the Federal Communications Act prohibits interception and divulgence of any telephonic communication by anyone, whether such communication be intrastate or interstate, and whether such interception be by a private individual, or by an agent of a state government acting under purported authority of a state statute.<sup>7</sup>

<sup>6</sup> *Weiss v. U.S.*, 308 U.S. 321, 327; *Benanti v. U.S.*, 335 U.S. 96, 104.

<sup>7</sup> In *Benanti* the Court pointed out that it has not yet been decided whether both an interception and a divulgence are necessary for a violation of §605 F.C.A. (355 U.S. at 100n.) This ambiguity furnishes the rationale on which federal investigative agents, such as the staff of the FBI, presently base their wiretapping activities. It is contended that since such interceptions are performed only for investigative purposes, and are not "divulged" by being offered in evidence in any court, the statute is not violated. (Hearings, C.R. Subcom. Sen. Judiciary; Communications from Attorney General William P. Rogers, Part 5, pp. 1481-2).

The federal policy has been part of the law of the land since enactment of the Federal Communications Act of 1934, even though not uniformly understood or applied. Indeed, 6 years prior to the enactment of the statute, in *Olmstead v. U.S.*, 277 U.S. 438, 4 justices of the Supreme Court (Holmes, Brandeis, Stone and Butler) not only characterized wiretapping as "dirty business" (Justice Holmes' words) but were of the view that evidence thus obtained violated the Federal Constitution's prohibition against unreasonable searches and seizures. At least several members of the present Supreme Court have asserted their adherence to this view.<sup>8</sup>

The national policy against wiretapping expressed in §605 F.C.A. is buttressed by similar prohibitions contained in statutes enacted by 33 states.<sup>9</sup> Only 6 states have statutes purporting to authorize law-enforcement officials to engage in wiretapping, upon compliance with specified procedures.<sup>10</sup>

Since the enactment of S. 3340 would constitute a first and far-reaching relaxation in the quarter-century federal prohibition against wiretapping, it may be anticipated that the enactment will ultimately have a broad impact on present wiretapping restrictions throughout all areas, federal as well as state. At the state level, it may be expected that in many of the 33 states which now prohibit wiretapping, enactment of S. 3340 will be urged as an example and invitation for parallel state enactments. At the federal level, it will inevitably and forcefully be urged that there is no logical justification to deny wiretapping authorization to federal agencies alone, once S. 3340 has relaxed and reversed the present national policy against wiretapping.

To mention these considerations, however, is not necessarily to oppose any modifications of the present national policy.

<sup>8</sup> See *On Lee v. U.S.*, 343 U.S. 747 (1952), dissenting opinions of Justices Douglas, Frankfurter, Burton. See also dissenting opinions in *Schwartz v. Texas*, 344 U.S. 199 (1952).

<sup>9</sup> Communication from Legislative Reference Service, The Library of Congress (Hearings, C.R. Subcom. Sen. Judiciary, Part 5, p. 1527). The communication lists 39 states as prohibiting wiretapping, but this list includes the 6 which permit limited wiretapping by law-enforcement officials.

<sup>10</sup> *Id.* at p. 1528. The 6 states are Louisiana, Maryland, Massachusetts, Nevada, New York and Oregon.

Rather, the purpose is to suggest that S. 3340 has a disarming simplicity which may serve to obscure the far-reaching policy changes which this measure will effectuate throughout the nation, at federal and state levels. In sum, it may be said to shift the national policy from one flatly prohibiting wiretapping at any level, to one favoring "controlled" wiretapping at all levels.

Viewed in this light, it is evident that a threshold and basic policy decision must be reached as the first step in evaluating S. 3340: Should this significant shift in national policy be effected? If so, does S. 3340 embody controls and standards requisite and appropriate for the revised national policy?

#### COMMITTEE CONCLUSIONS AS TO S. 3340

Our Committee has concluded: (1) that it is prepared to accept and recommend the basic change in national policy discussed above; (2) that S. 3340, in its present form, is deficient in the controls and standards requisite and appropriate for the revised national policy.

##### (A) *Basic Policy Conclusion.*

The considerations which entered into the basic policy conclusion of the Committee were various, as was the weight accorded to one or another of these considerations by the respective Committee members. There was general recognition that we are confronted in this area, as in so many others, with the search for that most elusive of formulae, in which a proper balance is struck between the respective needs of society and the rights of the individual. To some, the advantages of wiretapping in aid of law-enforcement officials in combatting crime seemed entitled to greater weight in the formula.<sup>11</sup> To others, it appeared that the rights of the individual require zealous protection in respect of police wiretapping for, as has been authoritatively asserted, "a telephone interception is a far more devastating measure than any search warrant."<sup>12</sup>

<sup>11</sup> See, e.g., Brown, *The Great Wire-Tapping Debate and The Crisis In Law Enforcement*, 6 N.Y. Law Forum, 265-282.

<sup>12</sup> Hofstadter, J., *In the Matter of the Interception of Telephone Communications of Anonymous*, 207 Misc. 69, 74-75 (N.Y. Sup. Ct., 1955):

In the final analysis, however, even those members of the Committee philosophically opposed to all wiretapping were induced by essentially pragmatic considerations to join in the Committee's conclusion that the national policy should officially shift from absolute prohibition of wiretapping to "controlled" wiretapping. For it is clear from a number of authoritative studies that, in the face of the present national policy, wiretapping by law-enforcement officials and others is now so widespread and entrenched a practice throughout the nation that it would be illusory to believe any complete prohibition could be made effectual, or that it would comport with public opinion.<sup>13</sup> These studies, moreover, indicate that the trend of both public and expert opinion is now in the direction of "controlled" wiretapping by law-enforcement officials, under continuous and close supervision.

Our Committee believes this trend may be salutary, and that a desirable solution may be achieved if—but only if—the controls under which the law-enforcement officials are permitted to engage in wiretapping are meaningful and adequate. Incorporation of such meaningful and adequate controls should be an absolute

"A telephone interception is a far more devastating measure than any search warrant. A search warrant is confined to a definite place and to specific items or, at least, to items of a stated class or description. Those in possession of the searched premises know the search is going on and, when the officer has completed his search, whether successfully or not, he departs. Not so, in the case of a telephone interception. The interception order is obtained ex parte and the person whose line is to be tapped is, of course, in ignorance of the fact. The tap is maintained continuously, day and night. Everything said over the line is heard, however foreign to the stated objective of the law-enforcement officers. The most intimate conversations, personal, social, professional, business or even confidential of an unlimited number of persons may be laid bare. In effect, the line of everyone who is called from or makes a call to the tapped line at any time is being tapped during the maintenance of the tap. When a line in a public telephone booth is tapped, as has on occasion been done, the conversations of people having no relation of any kind to the operator of the place in which the booth is situated or the person whose line is tapped, are overheard. It is little wonder that Justice Brandeis was moved to say in the *Olmstead* case: 'As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping.' (277 U.S. 438, 476.)"

<sup>13</sup> See, for example: DASH, SCHWARTZ, KNOWLTON, *THE EAVESDROPPERS* (1959); Westin, *Wiretapping: The Quiet Revolution*, *Commentary Magazine* April 1960 (reprinted in *Hearings, C.R. Sen. Judiciary, Part 5*, pp. 1957-1964); Westin, *The Wire-Tapping Problem*, 52 *Col. L. Rev.* 165; Rozenzweig, *The Law of Wire Tapping*, 32 *Cornell L.Q.* 514, 33 *Cornell L.Q.* 73.

condition to the shift in national policy sought by such measures as S. 3340. Discussed below are the important deficiencies of S. 3340 in this regard.

(B) *Deficiencies of S. 3340.*

The deficiencies of S. 3340 may be grouped in 4 categories, as follows: (1) lack of limitation in respect of type of crime; (2) lack of specification of requirements for obtaining court orders and maintaining records; (3) lack of prohibition of use of evidence obtained in violation of the statute; (4) lack of provision for federal surveillance.

(1) *Lack of limitation in respect of type of crime.* If a state court order is obtained, the bill would legalize state wiretapping in the investigation of any crime, even the pettiest misdemeanor. The sweep of the New York statute which it follows in this regard has been the subject of severe criticism;<sup>14</sup> we do not believe it should be permitted to set the standard for revised federal policy in the regulation of our nation-wide system of telephone communication.

A Nevada statute, enacted in 1957, authorizes court wiretap orders only where "there are reasonable grounds to believe that the crime of murder, kidnapping, extortion, bribery or crime of endangering the national defense or a violation of the Uniform Narcotic Drug Act has been committed or is about to be committed."<sup>15</sup> Limitation of wiretaps to more serious crimes of this type accords with a substantial body of expert opinion.<sup>16</sup>

Our Committee believes that such limitation to more serious crimes is highly desirable in order to curtail invasion of the right

<sup>14</sup> See authorities cited on the preceding page. See also the critical pronouncement of an incumbent Justice of the New York Supreme Court, based on his extensive first-hand experience with wiretapping under the New York statute, *In the Matter of the Interception of Telephone Communications of Anonymous*, (*supra*).

"New York Special Sessions Justice Frank Oliver testified that the court order had proved ineffective as a means of protecting the citizen, and that delegates to the constitutional convention never imagined that such orders 'would be issued on trivial grounds or in cases involving only suspicion of a misdemeanor or offense.'" (Westin, *The Wire-Tapping Problem*, 52 Col. L. Rev. 165, 195)

<sup>15</sup> Nev. Stat. ch. 242 (1957); see Appendix.

<sup>16</sup> For example, limitation to crimes "directly and immediately affecting the safety of human life" (Westin, *The Wire-Tapping Problem*, 52 Col. L. Rev. at 203); limitation to cases involving national security, treason, sabotage, espionage and related offenses (Mr. Edward B. Williams, Hearings, C.R. Subcom. Sen. Judiciary,

of privacy, but we do not favor limitation based on specific crimes. To avoid the gaps which may result from such specific enumeration, and to allow for some latitude in the various state criminal concepts, it is our recommendation that wiretap orders be limited to crimes punishable by maximum sentences of 5 years or longer. While we do not profess certitude that such a limitation would draw the line at precisely the optimum point, we feel it would be an appropriate starting point for the revised national policy, subject to revision in the light of the experience data which would be assembled pursuant to our fourth proposal discussed below.

(2) *Lack of specification of requirements for obtaining court order and maintaining records.* Authoritative studies of day to day practices in states which have statutes authorizing wiretapping emphasize the importance of spelling out in the statute the procedural and substantive requirements for obtaining the court order, in order to guard against perfunctory issuance of such orders on the basis of an inadequate showing; and also the requirement for the proper maintenance of records.<sup>17</sup>

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Part 5, p. 1485). At the federal level, H.R. 70, introduced by Congressman Celler during the preceding Congressional session would limit wiretapping by federal officials, pursuant to court order, to the crimes of espionage, kidnapping, sabotage, treason, sedition, and defined subversive activities. In connection with federal wiretapping, the Attorney General and the Director of the FBI have asserted that wiretaps are authorized by the Attorney General "only in cases involving the internal security of the Nation or where a human life may be imperilled such as kidnapping." (Hearings, C.R. Subcom. Sen. Judiciary, Part 5, pp. 1481-2).

<sup>17</sup> See, for example, DASH, SCHWARTZ, KNOWLTON, *THE EAVESDROPPERS* (1959) pp. 44-70; Westin, *The Wire-Tapping Problem*, 52 Col. L. Rev. 165, 203. See also *id.* at p. 196, in which a former Assistant District Attorney in New York is quoted as having stated in a report filed in connection with a Grand Jury investigation:

" \* \* \* no records were kept of the telephone conversations intercepted so that officers procured information which they were able to sell without suspicion of their superiors in the police department. On the basis of testimony given by high-ranking police officials called before the Grand Jury \* \* \* [the report] asserted that authority to tap telephones was being obtained on false affidavits. 'Dishonest statements' were used by policemen to obtain warrants; applications for wire-tapping warrants were often made without any information to support the requests \* \* \* This was an admitted practice in many parts of the Police Department. Without facts and without any information, members of the department supported their applications with such statements as a matter of convenience and as an expedient to obtain an order."

In 1957 and 1958 various safeguards were added to the New York law, designed in part to eliminate abuses such as those mentioned above; N.Y. Penal Law §§739-745.

We believe, therefore, that any federal legislation authorizing wiretapping pursuant to court order under state statute, should require that such an order be issued only upon an application which states the grounds therefor with a high degree of particularity. The federal legislation should include provisions to the effect that an *ex parte* order of a state court for the interception of a communication can be issued only upon an application of a designated responsible official setting forth fully the facts and circumstances upon which the application is based, showing that reasonable grounds exist for belief that such interception may disclose evidence of the commission of the crime punishable under the laws of that state by a maximum sentence of five years or longer. Compare Subdivision 1 of Section 7 of the Nevada wiretapping statute (Chapter 242, Nevada Statutes, 1957).<sup>18</sup> Without necessarily endorsing every detail, we also believe that provisions along the line of those contained in Section 7, Subdivisions 2 through 6, and Sections 8 and 9 of the Nevada Statute should be required by S. 3340 or by any other federal legislation which proposes to give federal sanction to wiretapping under state statutes. Excerpts from the Nevada Statute are set forth in the appendix of this report.

(3) *Lack of Prohibition of Use of Evidence Obtained in Violation of the Statute.* Some states which have statutes authorizing wiretapping pursuant to court order, nevertheless permit evidence obtained in violation of the statute to be received in evidence upon the trial.<sup>19</sup> In our federal courts, a firm line of decisions prohibits the admission of evidence obtained directly

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<sup>18</sup> As has previously been pointed out, our Committee does not recommend the Nevada statute's enumeration of specific crimes for which wiretapping may be permitted, but rather the establishment of a standard for limitation to the more serious crimes.

<sup>19</sup> In New York this has long been the rule; *Matter of Davis*, 252 App. Div. 591, 598; *Peo. v. McDonald*, 177 App. Div. 806, 809; *Peo. v. Katz*, 201 Misc. 414. In recent years, the New York Legislature has acted to exclude illegally obtained wiretap evidence. In 1957 receipt of illegally obtained wiretap evidence was prohibited in civil trials; §345-a Civil Practice Act. In 1959 the Legislature sought to amend this provision to extend the exclusionary rule to criminal trials, but the legislation was vetoed by the Governor (Hearings, C.R. Subcom., Sen. Judiciary, Pt 5, pp. 1877-1879).

or indirectly as the result of wiretapping in violation of §605 F.C.A.<sup>20</sup> However, the Supreme Court has declined to reverse convictions in state courts on the basis of such illegally obtained wiretap evidence, on the ground that §605 F.C.A. does not contain "a clear manifestation" of the intention of Congress to render inadmissible in state courts evidence obtained in violation of the statute.<sup>21</sup> It is in an effort to circumvent this result that the situations discussed in the *Pugach* and *O'Rourke* decisions (discussed above) have arisen.

We believe that if Congress now enacts legislation authorizing wiretapping by state officials in compliance with specified conditions, it should clearly provide that wiretap evidence (and the fruits thereof) obtained otherwise than in compliance with the statute, shall be inadmissible in any trial or proceeding, whether state or federal. It cannot be doubted that the exclusionary rule is an important, if not indispensable, aid in effectuating the statutory purpose.<sup>22</sup>

The power of Congress to restrict all wiretapping in order to protect the integrity of interstate communication, now exercised in §605 F.C.A., derives from the Commerce clause (Art. 1, §8) of the Constitution. Under the "necessary and proper clause" of Article 1, §8, and the Supremacy clause of Article VI, measures to effectuate the granted power are valid and paramount, even though they subordinate state law and rules of practice.<sup>23</sup> Perhaps the closest analogy to a federal statute barring admission of evidence in state courts is to be found in the immunity statutes.

In *Adams v. Maryland*, 347 U.S. 179, 183, the Court held that a federal statute prohibiting the use of testimony given by a con-

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<sup>20</sup> *Nardone v. U.S.*, 302 U.S. 379, 308 U.S. 338; *Weiss v. U.S.*, 308 U.S. 321; *Goldman v. U.S.*, 316 U.S. 129; *Benanti v. U.S.*, 355 U.S. 96.

<sup>21</sup> *Schwartz v. Texas*, 344 U.S. 199, 202-203. The Court stated (p. 203): "Since we do not believe that Congress intended to impose a rule of evidence on the state courts, we do not decide whether it has the power to do so."

<sup>22</sup> See, for example, the data presented by Mr. Justice Murphy in *Wolf v. Colorado*, 338 U.S. 25, 44-47 (dissenting opinion).

<sup>23</sup> See, e.g., *Maryland v. Soper*, 270 U.S. 9; *Ohio v. Thomas*, 173 U.S. 276, 283; *Boske v. Comingore*, 177 U.S. 459, 468. The situation is, of course, *a fortiori* where Congress has preempted the field; *Garner v. Teamsters*, 346 U.S. 485, *Pennsylvania v. Nelson*, 350 U.S. 497, *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236.

gressional witness as evidence "in any criminal proceeding in any court," was fully applicable and controlling in state courts as well as federal. Reversing a state court conviction in which the federally prohibited evidence was used, the Court stated:

"[S]ince Congress in the legitimate exercise of its powers enacts 'the supreme law of the land' state courts are bound by section 3486 (of Title 18 U.S.C.), even though it affects their rules of practice."

To the same effect, *Reina v. United States*, . . . . . U.S. . . . . (December 19, 1960) and *Ullmann v. U.S.*, 350 U.S. 422.

While not without some distinctions, these decisions clearly show that the Supreme Court has repeatedly upheld the right of Congress to control the use of evidence and practice in state courts when necessary to effectuate a federal power.

(4) *Lack of Provision for Federal Surveillance.* A statute providing for "controlled" wiretapping cannot properly be self-executing. If the Congressional policies and limitations are to be observed, there must be adequate supervision and enforcement.

Although assistance in supervision and enforcement at the state level should be welcomed and encouraged, the federal government cannot ignore its own responsibilities to exercise an informed surveillance over the operation of its new federal policy authorizing "controlled" wiretapping by law-enforcement officials. Accordingly, any legislation along the lines of S. 3340 should require each state, through specifically designated officials, to transmit to an agency of the federal government monthly and other periodic reports as to the number of wiretapping applications applied for, granted or denied, the nature of the crimes involved, and other relevant information. This federal agency, possibly the Federal Communications Commission or the Attorney General,<sup>24</sup> should be empowered to assure itself of the com-

<sup>24</sup> It has been suggested that in view of the federal investigatory activities over which the Attorney General exercises authority, there may be some question of possible conflicting interests if he were designated to exercise surveillance over the operation of the wiretapping legislation. From this point of view, vesting the duty in an independent agency such as the F.C.C. might be preferable.

pleteness and accuracy of the information filed with it, and should be required to file with Congress quarterly and other periodic reports with respect to the information thus compiled.

It is believed that this system of reporting will not only provide Congress with an informed review of the workings of the system on the basis of which it may determine whether amendments are needed, but will of its own force exercise a salutary restraining influence on the issuance of wiretapping warrants where the necessity for them is doubtful, and will help expose illegal wiretap activity.

*Dated: January 10, 1961.*

Respectfully submitted,

EDWIN L. GASPERINI, *Chairman*

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## APPENDIX

*EXCERPTS FROM CH. 242—NEVADA STATUTES (1957)*

## SECTION 6 (p. 335)

"Except as otherwise provided in sections 7, 8 and 9, no person shall intrude upon the privacy of other persons by surreptitiously listening to, monitoring or recording, or attempting to listen to, monitor or record, by means of any mechanical, electronic or other listening device, any private conversation engaged in by such other persons, or disclose the existence, contents, substance, purport, effect or meaning of any such conversation so listened to, monitored or recorded, unless authorized to do so by one of the persons engaging in the conversation."

## SECTION 7 (pp. 335-6)

"1. An ex parte order for the interception of wire or radio communications or private conversations may be issued by the judge of a district court or of the supreme court upon application of a district attorney or of the attorney general setting forth fully the facts and circumstances upon which the application is based and stating that:

(a) There are reasonable grounds to believe that the crime of murder, kidnapping, extortion, bribery or crime of endangering the national defense or a violation of the Uniform Narcotic Drug Act has been committed or is about to be committed; and

(b) There are reasonable grounds to believe that evidence will be obtained essential to the solution of such crime or which may enable the prevention of such crime; and

(c) No other means are readily available for obtaining such evidence.

2. Where statements in the application are solely upon the information or belief of the applicant, the precise source of the information and the grounds for the belief must be given.

3. The applicant must state whether any prior application has been made to intercept private conversations or wire or radio communications on the same communication facilities or of, from or to the same person, and, if such prior application exists, the applicant shall disclose the current status thereof.

4. The application and any order issued under this section shall identify fully the particular communication facilities on which the applicant proposes to make the interception and the purpose of such interception.

5. The court may examine, upon oath or affirmation, the applicant and any witness the applicant desires to produce or the court requires to be produced.

6. Orders issued under this section shall not be effective for a period longer than 60 days, after which period the court which issued the order may, upon application of the officer who secured the original order, in its discretion, renew or continue the order for an additional period not to

exceed 60 days. All further renewals thereafter shall be for a period not to exceed 30 days."

SECTION 8 (p. 336)

"1. During the effective period of any order issued pursuant to section 7, or any extension thereof, the application for any order under section 7 and any supporting documents, testimony or proceedings in connection therewith shall remain confidential and in the custody of the court, and such materials shall not be released nor shall any information concerning them be disclosed in any manner except upon written order of the court.

2. No person shall disclose any information obtained by reason of an order issued under section 7, except for the purpose of obtaining evidence for the solution or prevention of a crime enumerated in section 7, or for the prosecution of persons accused thereof, unless such information has become a matter of public record in a criminal action as provided in section 9."

SECTION 9 (p. 336)

"1. Any information obtained, either directly or indirectly, as a result of a violation of section 3, 4, 5 or 6 shall not be admissible as evidence in any action.

2. Any information obtained, either directly or indirectly, pursuant to an effective order issued under section 7 shall not be admissible in any action except:

(a) It shall be admissible in criminal actions involving crimes enumerated in section 7 in accordance with rules of evidence in criminal cases; and

(b) In proceedings before a grand jury involving crimes enumerated in section 7."

250/61/1

## COMMITTEE ON PROFESSIONAL ETHICS

## OPINION NO. 847

*Question:* For a number of years you have been "associated" with A, who is a member of the Pennsylvania Bar, and with B, who is a member of the District of Columbia Bar. You refer matters to them and they refer matters to you and, on a number of occasions, you have worked on common problems with one or both of them. You and they would now like to establish a common office in New York City. A and B would use this office when they are in New York City and would pay an appropriate part of the rental. In connection with the establishment of this office, you would like to use a letterhead in which the names of A and B would appear together with your name, specifically referring to the fact that A is a member of the Bar of the State of Pennsylvania and that B is a member of the Bar of the District of Columbia.

*Opinion:* Our Committee is of the opinion that it would be improper and in violation of the Canons of Professional Ethics for you to include on the letterhead as associates the names of A and B specifying that they are members of the Bar in the State of Pennsylvania and the District of Columbia. As we understand the relationship among yourself, A and B, it does not constitute a partnership but rather a relationship whereby they refer work to you and you refer work to them. A and B could not properly hold themselves out as having law offices in New York. See *In re Roel*, 3 N.Y. 2d 224 (1957). Hence, to set forth their names even though you refer to the fact of their admission to the Bar of Pennsylvania and the District of Columbia on your letterhead would be inconsistent with Canon 27.

Opinion No. 681 of this Committee is overruled to the extent it is inconsistent herewith.

November 17, 1960

## OPINION NO. 848

*Question:* 1. A contractor builds houses for speculation on his own land, places mortgages thereon and pays his own attorney fees therefor. The houses are then sold to purchasers who assume the mortgages and in many cases give second mortgages to the contractor. The contractor informs the purchaser in advance, and expressly stipulates in the contract with the purchaser, that irrespective of whether the purchaser uses the contractor's attorney, the purchaser must reimburse the contractor for the contractor's prior expense in closing the first and second mortgages. If the purchaser uses the contractor's attorney, the purchaser pays no additional fee. If the purchaser uses his own attorney, he must pay the fee of his attorney, in addition to the reimbursement which must be paid to the contractor.

2. The contractor erects the house, obtains a mortgage as stated above, but notifies the purchaser as an added incentive that if the purchaser uses the contractor's attorney, the contractor will pay the attorney and legal fees and disbursements of the purchaser.

3. The contractor erects the house as aforesaid and notifies the purchaser

that the purchase price includes all legal fees and that the purchaser must use contractor's attorney at no additional cost.

4. The purchaser asks the contractor to build a house for him on the contractor's lot. The contractor tells the purchaser that there is a charge of \$175 for "reimbursement for expenses incurred by the contractor in obtaining a mortgage, survey, search, recording fees, mortgage tax, etc." The purchaser goes with the contractor to contractor's attorney who advises the purchaser that he does not represent the purchaser, but states that the purchaser does not need an attorney to make sure he is getting good title to the property, since the bank's attorney will check the title for the bank when they grant the mortgage loan. The purchaser does not have to pay anything more than the \$175 to the contractor in the way of legal fees and disbursements.

5. The contractor's attorney draws up the contract, arranges for the mortgage or building loan in the name of the purchaser and handles the transfer of title to the purchaser. The purchaser has paid the sum of \$175. He has no legal representation as such and is not charged for any of the work done on his behalf. If he retains his own lawyer, he still must pay the \$175 charge and then must also pay his own attorney's fee.

*Opinion:* It is not the function of this Committee to pass upon the propriety of the conduct of the contractor, who presumably is entitled to include in the negotiated price for the house reimbursement for any expenses he has incurred. The first four sets of facts in effect present the same fundamental question, namely, is it professionally proper for the attorney directly or through the contractor to offer to represent the purchaser without charge. It is the opinion of the Committee that under the circumstances described he cannot do so. His professional relationship with the contractor in each case is such that it would be unrealistic to suppose that he can adequately represent the interests of the purchaser, and it would be extremely difficult for him to avoid a conflict of interest proscribed by Canon 6. Moreover, the attorney is put in the apparent position of assisting the contractor in a device designed to avoid his having to deal with independent counsel.

Where the contractor encourages the purchaser to use the contractor's attorney, it is the duty of the attorney to inform the purchaser affirmatively that under the circumstances he cannot adequately represent the purchaser and that the purchaser's interests would be better served by a lawyer of his own. If, after this duty has been fairly carried out, the purchaser insists upon retaining the contractor's attorney, it would not be improper for the lawyer to represent the purchaser. Under no circumstances should the contractor's lawyer suggest to the purchaser that the purchaser does not need separate legal representation. Offering to represent the purchaser without charge is tantamount to suggesting he not obtain separate counsel. Nor should the contractor's lawyer permit the contractor to solicit business for him by suggesting or insisting that the purchaser retain him.

In the fifth set of facts, there is no effort or device for encouraging the purchaser to forego separate representation. Accordingly, no improper conduct appears to be involved.

December 22, 1960

## CO-ORDINATING COMMITTEE ON DISCIPLINE

## PROGRESS REPORT

*The co-ordinating committee on discipline of The Association of the Bar of the City of New York, New York County Lawyers' Association and Bronx County Bar Association has submitted the following progress report to Presiding Justice Bernard Botein, of the Appellate Division, First Department:*

Pursuant to the provisions of the order of the Appellate Division of the Supreme Court of the State of New York, First Department, issued on February 3, 1959, the co-ordinating committee on discipline has been conducting a continuous study and investigation of the practices of attorneys and others in the prosecution of personal injury claims.

The committee's survey and investigation so far has uncovered instances of violations, on the part of a number of attorneys investigated, of canons of professional ethics, of penal statutes and of certain rules of this court.

Among some of the violations by attorneys of canons of professional ethics, of which many also constitute violations of penal statutes, are the following:

(a) Cases solicited. i. Personally. ii. By engaging "chasers." iii. By arrangements with policemen or hospital attendants. iv. By arrangements with auto repair shops. v. By arrangements with doctors, insurance brokers and others.

(b) Splitting of legal fees with laymen (the so-called "lay" adjusters).

(c) Agreeing to and paying the expenses of litigation, including doctors' bills—without expectation of reimbursement.

(d) Knowingly preparing bills of particulars containing false or exaggerated claims as to extent of injuries, treatment and loss of earnings.

(e) Knowingly using false medical reports and medical bills.

(f) Knowingly using false statements as to employment and/or loss of earnings.

(g) Conversion of clients' funds.

(h) Participating in subornation of perjury.

Among some of the violations of the rules of this court uncovered are the following:

(a) Failure to file statements of retainer and/or closing statements.

(b) Making false statements as to referrers of clients.

(c) Failure to give copy of closing statements to clients.

(d) Failure to comply with the rule respecting contingent fee agreements.

(e) Failure to preserve files and records.

(f) Failure to maintain special bank accounts for clients' funds.

(g) Grouping and combining of claims.

(h) Failure to apply for court order approving compromise of infants' claims and of legal fees in connection with same.

With the view of preventing continuation of such abuses the committee has:

(a) Recommended to the court the revision and strengthening of certain of its rules governing the conduct of attorneys; many of which recommendations have already been adopted.

(b) Brought disciplinary proceedings against attorneys where the evidence uncovered in the preliminary investigations justified such course of action.

In addition to continually examining the statements of retainer and closing statements filed by attorneys, the committee interrogates attorneys, doctors, claimants and other witnesses where professional misconduct may be indicated.

It is the customary practice of the committee to interrogate under oath witnesses, who may, if they wish, have their counsel present in the hearing room, and such testimony is transcribed by an official court reporter. Such testimony, as well as the investigation being conducted, is safeguarded by the veil of secrecy provided in section 90 of the Judiciary Law.

To date, the number of attorneys whose practices have been investigated is forty-three.

To date, the number of attorneys against whom the committee brought disciplinary proceedings is fourteen.

To date, the number of witnesses examined under oath is seven hundred and forty-six.

Including number of doctors interrogated, forty-three.

To date, the number of pages of testimony taken is approximately seven-thousand.

Of the fourteen petitions in disciplinary proceedings filed three have been disposed of by disbarment or resignation; and as to the others, trial proceedings are either under way or will begin in the near future.

In addition to these disciplinary proceedings brought by the committee, it wishes to report that based on its investigation of the practices of two other attorneys, it adduced evidence which was turned over to the District Attorney of New York County pursuant to a standing order of the Appellate Division, and the district attorney has obtained indictments of both these attorneys, which indictments are presently pending.

#### CO-OPERATION WITH THE JUDICIAL CONFERENCE

Since July 1, 1960, the administrative work of receiving for filing statements of retainer and closing statements has devolved upon the Judicial Conference, at No. 270 Broadway, New York City. The Appellate Division has entered an order directing that the data contained in such statements of retainer and closing statements be made available at all times to this committee. Liaison has been established between the staffs of the Judicial Conference and this committee, and these staffs work together continually in close harmony.

## LIAISON WITH OTHER AGENCIES

I. *Current Tow Truck Investigations.* The district attorneys of the various counties in New York City have been conducting investigations into alleged tow truck rackets which appear to involve tow truck operators, members of the police department and attorneys.

This committee since its early days, and prior to such investigations, has established liaison with the offices of the various district attorneys.

When the tow truck investigations were publicized in the press this committee communicated with the various district attorneys and requested to be kept informed of any information uncovered with respect to solicitation of retainers to prosecute personal injury claims. The various district attorneys are co-operating and have transmitted some information which is receiving the attention of the committee. It is expected that more of such information will be transmitted to the committee during the coming year.

II. *Police Department.* Since its inception this committee has had close, effective liaison with the police department. When the tow truck investigations above referred to commenced, the liaison between this committee and the police department was enlarged to embrace this area specifically.

III. *Public Agencies.* This committee has, since its early days, established liaison, which still continues in a close and effective manner, with numerous other public agencies, including the offices of the Attorney-General of the State of New York, the city commissioner of investigation, the state commission of investigation, the Corporation Counsel of the City of New York, the city department of welfare, the city department of hospitals, the waterfront commission and the state department of education, which supervises the professional conduct of doctors.

IV. *Division of Professional Conduct, State Department of Education (Medical Profession).* It is well known that a lawyer usually cannot be successful in the prosecution of a false claim for personal injuries without the active connivance of a doctor, who would thereby be equally guilty of professional misconduct. In uncovering evidence of professional misconduct on the part of lawyers the committee quite often, in the same process, uncovers evidence of misconduct on the part of doctors who supply medical reports and bills, which are false in whole, or in part, or grossly exaggerated.

This committee has established close liaison with the state department of education, division of professional conduct, which conducts inquiries into the practices of doctors much the same as this committee does with respect to attorneys.

Whenever in the course of its investigation this committee uncovers evidence warranting the investigation of the professional conduct of a doctor, application is made to the Appellate Division for leave to transmit such evidence to the division of professional conduct of the state department of education for its attention.

The committee is encouraged by reports it is receiving that its activities are having a salutary and deterrent effect. Much of the credit is due to the devotion, loyalty and hard work of its small but dedicated staff.

Respectfully submitted,

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HARRY LESSER,

*Members of the Co-ordinating Committee on Discipline*

HENRY WEINER,  
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# EQUAL JUSTICE FOR THE ACCUSED

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for Indigent Defendants*

by

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OF THE ASSOCIATION OF THE BAR  
OF THE CITY OF NEW YORK

and

THE NATIONAL LEGAL AID  
AND DEFENDER ASSOCIATION

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